

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

ALEK SCHOTT, )  
Plaintiff, ) Case Number  
 ) SA:23-CV-00706-OLG-RBF  
vs. )  
 )  
JOEL BABB, ET AL, ) San Antonio, Texas  
Defendants. ) December 12, 2024  
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MOTION HEARING (via Zoom Videoconference)  
BEFORE THE HONORABLE RICHARD B. FARRER  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (December 12, 2024, 10:00 a.m.)

2 \* \* \*

3 THE COURT: This is Richard Farrer. I'm the  
4 Magistrate Judge. Can you all hear me and see me okay?

5 MS. HEBERT: Yes, Your Honor.

6 MR. WINDHAM: Yes, Your Honor.

7 MR. FRIGERIO: Yes, Your Honor.

8 THE COURT: Great. Let's go ahead and get started  
9 then. So we're on the record, this is SA:23-CV-00706-OLG,  
10 Schott versus Babb, et al. Why don't we just start with  
11 appearances. Counsel for plaintiff?

12 MS. HEBERT: Good morning, Your Honor. Christi Hebert  
13 for plaintiff, and I'm joined by my colleagues, Josh Windham  
14 and Josh Fox.

15 MR. WINDHAM: Good morning, Your Honor.

16 THE COURT: Good morning. And for defendants?

17 MR. FRIGERIO: Charles Frigerio for Bexar County and  
18 Deputy Molina.

19 THE COURT: Good morning to you as well. So we've  
20 got --

21 MR. FRIGERIO: And Mr. Blair Leake is representing  
22 Deputy Babb.

23 THE COURT: Thank you. Sorry, counsel. Good morning  
24 to you as well, Mr. Leake. Okay, so we've got two matters on  
25 the calendar this morning. The first is a motion to exclude an

1 expert, Palacios, this is plaintiff's expert, and then there's  
2 plaintiff's motion to quash some subpoenas. Why don't we start  
3 with the motion to exclude and why don't I start with you, Mr.  
4 Frigerio.

5 MR. FRIGERIO: Yes, Your Honor.

6 THE COURT: Is it your motion or is it Mr. Leake's?

7 MR. FRIGERIO: It's Bexar County's motion and Deputy  
8 Molina's motion, Your Honor. It was timely filed within the  
9 timeframe of this Court's docket control order with the filing  
10 of the expert report. And we filed the motion to strike based  
11 on the fact that this expert, Mr. Palacios, is basically  
12 looking at the video from the plaintiff, Mr. Schott, and is  
13 interpreting the video and giving his opinions about what he  
14 interprets from the video which is very similar to *Roundtree*  
15 *versus San Antonio* where Judge Chestney excluded an expert who  
16 was testifying using again body-worn camera and saying and  
17 making conclusions as to whether or not -- I believe that was  
18 an excessive force case and to whether or not the officers  
19 acted appropriately.

20 This individual, Mr. Palacios, makes many conclusions,  
21 one about the fog line, which I believe the jurors can look at  
22 the video themselves and determine whether or not the fog line  
23 was crossed. Second of all, he also gives legal conclusions  
24 which are, I believe, inadmissible and we are objecting to that  
25 as to how long you have to be across the fog line before it is

1 a violation of the law. And third, he makes credibility  
2 determinations with regard to Deputy Babb as to what -- he  
3 concludes as to what he believes Deputy Babb could or could not  
4 see, and those conclusions are based on speculation and again  
5 off the video that he is claiming to have -- which he did view,  
6 but he's drawing all these conclusions off the video which is  
7 not going to enhance the jury because the jury can look at the  
8 video themselves and determine what had occurred.

9 THE COURT: Okay. And you didn't depose him; is that  
10 right?

11 MR. FRIGERIO: We have a deposition scheduled, but we  
12 did not depose him yet. I believe it's scheduled for January.

13 THE COURT: But you're going to depose him. Should we  
14 wait until after you've deposed him then to take this issue up?

15 MR. FRIGERIO: I don't believe so, Your Honor. We did  
16 not actually set the deposition. Deputy Babb set the  
17 deposition of the expert.

18 THE COURT: Okay.

19 MR. FRIGERIO: That's whatever the Court wants, if you  
20 would prefer.

21 THE COURT: I guess you're proceeding with that  
22 deposition at that time by agreement with the other side?  
23 Isn't that right? I guess Mr. Leake might be better informed  
24 on that issue. Is that how you're going forward with that one?

25 MR. FRIGERIO: You're on mute, Blair.

1 THE COURT: Sorry, we're not picking you up on the  
2 sound.

3 MS. HEBERT: Blair's sound is not working. I'll just  
4 speak until he can figure out his sound. Mr. Windham is going  
5 to respond on our side for the motion to exclude, but we have  
6 his deposition actually set for next week and Blair noticed  
7 that deposition, scheduled it, and we are presenting Sergeant  
8 Palacios on Thursday next week.

9 THE COURT: Okay.

10 MR. LEAKE: And hopefully is my microphone working  
11 now?

12 MR. FRIGERIO: Yes.

13 MR. LEAKE: Great, I second what Ms. Hebert said.

14 THE COURT: All right, great. Let me just hear --  
15 unless, Mr. Frigerio, there's more you want to say. Obviously  
16 I've read the motion, but anything else you want to emphasize  
17 before I get the opposing perspective?

18 MR. FRIGERIO: No, Your Honor. I believe that covers  
19 it.

20 THE COURT: All right. Well, why don't we hear the  
21 response then.

22 MR. WINDHAM: Thank you, Your Honor. And Josh Windham  
23 for Alek Schott. So Sergeant Palacios offers routine accident  
24 reconstruction testimony, the sort of testimony that courts and  
25 juries across the country hear pretty much every day when

1 deciding how to get to the bottom of what happened during a  
2 traffic incident. The only difference here is that this case  
3 isn't about, you know, who caused the car accident, but whether  
4 my client's tires crossed over the painted line on the left  
5 side of the highway before Deputy Babb pulled him over. And  
6 the expert testimony here helps clarify that factual issue.  
7 None of the County's objections justify striking it.

8 I want to start with Rule 702 which the County's  
9 motion doesn't really address, but which I think does add some  
10 helpful context to this discussion. So Sergeant Palacios is  
11 qualified, his testimony is relevant, and his testimony is  
12 reliable. I'll start with qualifications briefly. He's got a  
13 24-year career in law enforcement that included highway patrol,  
14 writing tickets for things like failure to maintain a lane. He  
15 parleyed that career into a 17-year career in accident  
16 reconstruction where he analyzes car movements in lines of  
17 sight. That's obviously more knowledge and experience than the  
18 ordinary person has which is all 702 requires.

19 The testimony is relevant. One of the main questions  
20 in this case is whether Deputy Babb actually saw a traffic  
21 violation. If we had Deputy Babb's dash cam footage, we can  
22 all just watch it and see for ourselves, but we don't have that  
23 footage because Deputy Babb turned off his camera right before  
24 the supposed violation. So we've got to use Alek's dash cam  
25 footage, which is helpful, but it doesn't directly show his

1 tires or Deputy Babb's perspective, which is where Sergeant  
2 Palacios's testimony comes in. And he visited the site of the  
3 stop, he took measurements, he ran test drives, he drew a few  
4 conclusions that you just can't get from watching Alek's dash  
5 cam on its own. One of those conclusions is that Alek's tires  
6 are wider than the distance between the painted line and the  
7 rumble strip, so if Alek had crossed over the line, you would  
8 have heard that on his dash cam footage. Two, if Alek had  
9 crossed or even touched the line, the ridges on his hood, which  
10 are all you can see on Alek's video, would have been further to  
11 the left on the video than they were. And number three, Deputy  
12 Babb's perpendicular angle on the side of the road wouldn't  
13 have allowed him to see Alek's tires on the left side of his  
14 car. All three of those points will help the fact finder  
15 determine whether Deputy Babb saw a traffic violation, which  
16 again, you can't get just from watching Alek's video.

17 Now, reliability. The testimony is reliable, it flows  
18 from his decades of experience in highway patrol, accident  
19 reconstruction. It relies on site measurements and test  
20 drives, and it draws clear, easy to follow conclusions about  
21 where Alek's tires were positioned and what Deputy Babb was  
22 able to see. If the County has concerns about the substance of  
23 that analysis, that's an issue for cross-examination, not for  
24 exclusion.

25 So let me address the County's three specific

1 objections which Mr. Frigerio kind of just covered. About the  
2 video, he's not just watching the video and narrating it like  
3 the experts were in all the cases that the County cites.  
4 Instead, what he's doing is he's going to the site, taking  
5 measurements, and providing information that informs the jury  
6 or this Court at summary judgment when it's watching the video.  
7 It will give the fact finder more information so that it can  
8 understand what the video is actually showing. That's not  
9 anything like what their cases involve, it's more like the  
10 testimony from the Fifth Circuit decision in Alvarado-Zarza or  
11 in Davis, from Judge Pitman's decision.

12 Now, as for speculation, the County says that Sergeant  
13 Palacios is speculating about what Deputy Babb's state of mind  
14 was. He isn't, he's offering opinions about where Alek's tires  
15 were located and what Deputy Babb's field of vision would have  
16 allowed him to see. Those opinions are based on measurements  
17 and test drives that he coordinated himself. None of that  
18 involves speculation, it's basing an opinion on facts or data  
19 which is what Rule 702(b) requires.

20 Now, finally, regarding the law, we agree, of course,  
21 that, generally speaking, experts can't give legal conclusions,  
22 but the few lines in the report about traffic law are just  
23 there to provide some context for his analysis. At summary  
24 judgment, this Court will, of course, draw its own conclusions  
25 about what Texas traffic law is. If the claim goes to trial,



1 the County can seek a limiting instruction about the scope of  
2 his testimony. But at this stage, there's no basis for  
3 striking the entirety of his report which is what the County  
4 seeks to do based on a few lines about traffic law.

5 Now, one final point. I just want to reiterate if  
6 Deputy Babb had not turned off his dash camera at the moment of  
7 truth, we wouldn't be here talking about this. We could all  
8 just watch the video and argue about what he saw, but we don't  
9 have that video, we have Alek's video, and Sergeant Palacios's  
10 analysis provides some helpful information for the fact finder  
11 that will allow it to assess what the video shows. Striking  
12 his testimony wouldn't just be legally wrong, it would be I  
13 think unjust because it would allow the County to benefit from  
14 Babb's choice to thwart the best evidence of what he saw. I  
15 don't think the Court should allow that, and so we'd ask that  
16 the motion to strike be denied.

17 (Pause.)

18 MR. FRIGERIO: Judge, we can't hear you.

19 THE COURT: You can't hear me?

20 MR. FRIGERIO: No, you were off for a second.

21 THE COURT: All right. Can you hear me now?

22 MR. FRIGERIO: Yes.

23 THE COURT: All right, there we go. So, counsel, just  
24 break down for me, just provide an example, maybe a  
25 hypothetical, what would be impermissible just sort of play by

1 play of the video versus sort of what you're talking about  
2 here. Just explain to me a little further sort of how you  
3 anticipate this is going to go or would go if there's a  
4 deposition or if there's testimony at a trial.

5 MR. WINDHAM: Right, so I think a case involving play  
6 by play, Castro is a case that they cite from the Western  
7 District of Texas, 2022. There, there's an expert who is  
8 testifying about -- he's a safety expert, it's a slip-and-fall  
9 case. The expert was basically narrating the video as the jury  
10 was watching it and testifying about the condition of the mat  
11 that everybody could see in the video. The difference here is  
12 that we can't all see the fact at issue. We can't see from  
13 Alek's video where the tires are located. That's where  
14 Sergeant Palacios comes in. He provides measurements of Alek's  
15 car and he determines where the tires are located in relation  
16 to ridges on the hood. So that information will allow the jury  
17 to say, okay, based on the spot of the ridges on the road, we  
18 know where his tires are. We don't have information here at  
19 least about what Deputy Babb can see from his angle, so we had  
20 to have Sergeant Palacios go out to the side of the road and to  
21 the exact spot where Deputy Babb was, which the jury can't do  
22 because we're talking about a dangerous highway with cars  
23 flying by. Having an expert go and stand in that spot and take  
24 photos as we recreate Alek's driving provides a pretty good  
25 example of what Deputy Babb could or couldn't have seen from

1 his angle on the side of the road.

2 THE COURT: Okay. And then what would be sort of  
3 crossing the line, no pun intended, on legal conclusions,  
4 right? What can the expert say that informs the sort of  
5 probable cause issue here and what is something that the expert  
6 you wouldn't anticipate would be allowed to say?

7 MR. WINDHAM: So I agree that to the extent Sergeant  
8 Palacios characterizes Texas traffic law as such and says this  
9 is a violation and this isn't, that's not binding on the Court,  
10 of course. And so to the extent that that's in the report, I  
11 think it's -- the Court isn't bound by that, but it also  
12 doesn't justify striking the entire report. That said, his  
13 testimony about what actually happened factually forms the  
14 basis of the conclusion that the jury might reach about whether  
15 a traffic violation was committed. At the end of the day, this  
16 is about what Deputy Babb saw, what he observed. We know that  
17 from Ren(ph), we know that from Cole. It's about what he saw  
18 that day. Did he see a violation? And having an expert  
19 provide some information about where the tires are located in  
20 relation to ridges on Alek's hood, what Deputy Babb's field of  
21 vision did and did not include, that's all helpful information  
22 the jury can consider and that will allow it to watch the video  
23 with a bit more context.

24 (Pause.)

25 MR. FRIGERIO: Judge, you're on mute again. I'm not

1 sure what's going on.

2 THE COURT: What's going on? How about now?

3 MR. FRIGERIO: Now you're on.

4 MR. WINDHAM: It works.

5 THE COURT: Who knows. Is that the kind of state of  
6 mind issue that Mr. Frigerio is talking about? In other words,  
7 if you're talking about what Deputy Babb saw or didn't saw as  
8 opposed to what a person in that position could see or, you  
9 know, sort of is that the distinction here? What's he getting  
10 at when he's talking about state of mind opinions, at least  
11 from your perspective?

12 MR. WINDHAM: So I hesitate to characterize Mr.  
13 Frigerio's argument, but I take him to be saying that Sergeant  
14 Palacios can't testify about what Deputy Babb thought. And the  
15 report if you read it isn't about what Deputy Babb thought one  
16 way or the other. What he thought is legally irrelevant under  
17 the *Ren(ph)* case. The question is what an officer in his shoes  
18 could have seen that day, and that's what Sergeant Palacios's  
19 testimony is all about, what he was able to see, what his field  
20 of vision was and where Alek's tires actually were in relation  
21 to the ridges on his hood, which again, you can't see from  
22 Alek's video because we don't have those measurements unless  
23 you have an expert go out there and take them.

24 THE COURT: Okay. All right. I got you. Thank you.  
25 Mr. Frigerio, anything in reply?

1 MR. FRIGERIO: In reply, Your Honor, I do not feel  
2 that the expert's opinion will aid the jury. The jury can well  
3 look at the camera from Mr. Schott and make their own  
4 determination. As to the expert, Mr. Palacios, testifying to  
5 the state of mind or what he believes, this expert believes  
6 what Deputy Babb could or could not see, I believe that's  
7 speculation and that should be inadmissible. And I believe  
8 that counsel has now admitted that the legal conclusions that  
9 are in the report should be inadmissible as well.

10 THE COURT: And are they correct at characterizing  
11 your motion as seeking to strike the expert in his entirety?

12 MR. FRIGERIO: Yes, Your Honor, but really the three  
13 issues that we're dealing with were the ones that I just  
14 described, the fog line, the violation of and legal conclusions  
15 of law and the state of mind of Deputy Babb.

16 THE COURT: Okay. All right. Well, I appreciate it.  
17 Look, I'm comfortable with the argument from plaintiff with  
18 respect to establishing just at least for gatekeeping purposes  
19 the bona fides of this expert and this sort of baseline  
20 reliability. I don't think there's a basis here to exclude the  
21 expert in its entirety, and I appreciate the acknowledgment  
22 that to the extent that the report might sort of overreach or  
23 overstep here or there, there's limiting instructions available  
24 if we're going to be pretrial, and obviously the Court is not  
25 going to be bound by -- so all that is to say I'm going to deny

1 the motion to exclude.

2 Let's go on to the motion to quash. This is  
3 plaintiff's motion, so why don't I stay with your side,  
4 Ms. Hebert. And which of you or your colleagues is going to  
5 present your argument on that one?

6 MS. HEBERT: Thank you, Your Honor, and I will present  
7 our argument on the motion to quash. Just as context for Your  
8 Honor, plaintiff is asking the Court to quash two overbroad  
9 third-party subpoenas that defendants have e-mailed to  
10 Ms. Casey who is a therapist that Alek saw and his employer,  
11 RMS. And quite frankly, defendants can't bear their burden of  
12 showing the necessity of these third-party subpoenas. They ask  
13 for all records pertaining to Alek Schott and they aren't  
14 tailored to this dispute at all. They are served by a  
15 third-party record retrieval company which is not in and of  
16 itself of course a problem, but it illustrates the fact that  
17 these are just broad generic third-party subpoenas that someone  
18 who is not familiar with the case serves or sends off, and they  
19 seek every scrap of information pertaining to Alek. All  
20 e-mails, all performance evaluations, all benefits records, so  
21 just incredibly broad. And within that scope, they seek  
22 irrelevant information, information that Alek has already  
23 provided and, therefore, there's no necessity to subject a  
24 third party to discovery burdens.

25 And then they also seek privileged and confidential

1 information. The privileged information is the therapy notes  
2 from this therapist. And in the court-ordered conference that  
3 this Court asked us to do before this hearing, counsel for  
4 defendants indicated that the only thing they're really seeking  
5 from the therapist is the therapy notes. And those therapy  
6 notes are at the heart of the psychotherapist/patient  
7 privilege, which is recognized by the U.S. Supreme Court in the  
8 case of Jaffee, and that the Fifth Circuit has also  
9 subsequently recognized in a case called Murra, and other  
10 District Courts in this Circuit have also recognized. Now,  
11 Murra is a --

12 THE COURT: Haven't you put that information --

13 MR. FRIGERIO: Can't hear you, Judge.

14 MS. HEBERT: I'm sorry, Judge, your volume is really  
15 low.

16 THE COURT: I wonder why.

17 MS. HEBERT: I just turned you up on mine. Whatever  
18 you did -- I think there might be a lag.

19 THE COURT: I appreciate you all just letting me know  
20 when you can't hear me, so please keep doing that.

21 I'm just asking you, haven't you put these notes at  
22 issue by seeking damages for mental anguish? And assuming  
23 hypothetically that is the case and that this type of  
24 information is discoverable, talk to me about a little bit  
25 about those damages. And in the motion you talk about sort of

1 garden variety mental anguish, maybe you could explain to me  
2 what you're getting at there.

3 MS. HEBERT: Sure. And I would direct Your Honor to  
4 two very relevant cases. One that is *Stafford versus New*  
5 *Dairy*, that's a 2024 case out of the Northern District, and  
6 then one from the Western District out of 2023, and that's  
7 *Flemming versus Methodist Hospital*, by Judge Chestney. And  
8 both of those cases say that merely alleging in your complaint  
9 some emotional distress situation doesn't waive, doesn't put it  
10 in issue someone's mental -- doesn't waive the privilege to  
11 therapy notes. And I'm going to just read the quote from  
12 Chestney about what was alleged in that complaint. The  
13 plaintiff in a employment dispute alleged she suffered  
14 embarrassment, humiliation, inconvenience, mental and physical  
15 distress, loss of enjoyment of life, much broader than what we  
16 allege here which is just like minor stress and anxiety. And  
17 Judge Chestney found that that is garden variety emotional  
18 distress damages and doesn't waive the psychotherapist/patient  
19 privilege to protect notes, because that's kind of a sacred  
20 privilege to be able to talk to your therapist. And for  
21 someone like Alek, why this is so important, Your Honor, is  
22 that it would penalize a plaintiff like Alek who has a  
23 constitutional violation and has suffered some stress and  
24 anxiety about it, talks to their therapist, any time a  
25 plaintiff suffers stress or anxiety from a tort or



1 constitutional violation, they would be penalized by going to a  
2 therapist because that record, that communication with that  
3 therapist would then be discoverable. And it also opens up  
4 every plaintiff who brings a constitutional case to some  
5 searching inquiry into their therapy records.

6 So from a policy perspective, it is really bad policy  
7 to say that every time you put *I suffered some stress or*  
8 *anxiety as a result of the violation of my constitutional*  
9 *rights*, that means you waive your privilege to confidential  
10 communications with your therapist. And there is a different  
11 type of situation where you put your mental condition as part  
12 of a claim or as a cause of action in issue, and the cases that  
13 find that waiver they tend to be things like personal injury  
14 lawsuits where there are severe physical injuries or severe  
15 mental injuries and the plaintiffs in those cases are relying  
16 on medical experts and so would not be fair to allow a  
17 plaintiff to shield that information.

18 But here we're not introducing the therapist as a  
19 witness, we're not relying on her notes, we're not relying on  
20 that evidence, and in fact, we're not really relying on the  
21 fact that he went to therapy at all. He's going to talk about  
22 his own emotional reaction to the violation of his  
23 constitutional rights. It's irrelevant whether he went to  
24 therapy or not.

25 THE COURT: But is he seeking compensation for that?

1 MS. HEBERT: He is seeking compensation for his stress  
2 and anxiety, but if the Court finds that there is a waiver in  
3 merely alleging stress and anxiety, he will pull those claims  
4 down because we don't believe that that is a fair penalty for a  
5 plaintiff, and so we refuse to waive that privilege.

6 THE COURT: Okay. And then you talked briefly about  
7 the employment records. Anything else you want to mention  
8 about those?

9 MS. HEBERT: Yeah, I guess the broader perspective is  
10 they're just incredibly searching, and defendants haven't  
11 really anchored that to any particular part of their case that  
12 they are looking to prove. And to the extent that they're  
13 saying there's some element of damages, that's not enough for  
14 this broad request to get all of his employment records and  
15 that's been found by other courts not to be enough. And to the  
16 extent they're trying to say that there is a -- that the  
17 employment records are potentially relevant to his travel  
18 patterns or his job duties, there's no reason why they can't  
19 request that information from Alek himself and have to subject  
20 a third party to discovery burdens.

21 And I'll add a finer minor point, Your Honor, which we  
22 say pales in comparison to the substantive points, but the  
23 procedural point is that these subpoenas have not been  
24 personally served. And courts in this Circuit generally  
25 require personal service for a subpoena, but to the extent

1 there's any case for an alternative form of service, defendants  
2 just can't show that they've diligently attempted to serve  
3 these subpoenas. They made one call to each of the respective  
4 recipients. There's some allegation that a process server  
5 tried to get into the airport hanger, but our client didn't  
6 know who they were and we don't represent RMS. And then  
7 there's handwritten notes that the process server resorted to  
8 e-mail, and defendants are just saying, you know, e-mail should  
9 be enough in this case. And that, quite frankly, doesn't  
10 satisfy the rules without a diligent attempt to serve and that  
11 this Court then blesses.

12 THE COURT: Okay, thank you. Who would like to talk  
13 on the other side? Is that you, Mr. Frigerio?

14 MR. FRIGERIO: Yes, Your Honor. We went through  
15 obviously a third party, Kim Tindall & Associates, which was  
16 bought out by Magna Services. It's a typical -- it's how you  
17 obtain records. There's nothing unusual about that, so as far  
18 as service is concerned, they couldn't personally serve them,  
19 they contacted them by e-mail, and then the motion was filed.  
20 And of course, we ordered that to be stopped, the process,  
21 until the Court were to rule on the substance of the subpoenas  
22 themselves. They are limited to a five-year period. As far  
23 as --

24 THE COURT: Talk to me about that. I mean, it's some  
25 limitation, but I mean this stop happened in 2022, right? So

1 why --

2 MR. FRIGERIO: Yes, Your Honor. I would be willing to  
3 even make it even further, maybe a year before or year after.  
4 I mean, we need to have some -- I thought five years was  
5 limiting enough. I'd be willing to limit it more, but the  
6 issue is you can't have your cake and eat it too. You can't  
7 sue for damages and then say the only person that he has seen,  
8 the only healthcare provider he has seen as a result of this  
9 incident was Ms. Casey. And then they turn around and say you  
10 can't have the records.

11 THE COURT: What are you going to do with those  
12 records at this point? Right? Your time to get an expert on  
13 him is over, so what's the value of these records now? This  
14 sort of -- I think you've just conceded, concededly overly  
15 broad, maybe you're not conceding it, but I think we've arrived  
16 at the point that five years of counseling records seems overly  
17 broad as well as employment records. So, you know, what are  
18 you going to do with this stuff now?

19 MR. FRIGERIO: I mean, we're entitled to them in case  
20 when we go to trial we'll need to know whether or not he really  
21 did suffer an anxiety. Maybe he did and maybe he didn't, we  
22 need to know. We're entitled to be able to have those records.  
23 The case that we cited, Braymiller, that was a discrimination  
24 case in employment against Lowe's, and that was Judge Mathy who  
25 determined that once you're suing for damages of mental

1 anguish, that you waive that and you are entitled -- the  
2 defense is entitled to those records, and I don't think there's  
3 any question about that.

4 MR. LEAKE: Your Honor, may I add something here?

5 THE COURT: Go ahead.

6 MR. LEAKE: There was testimony in his deposition  
7 along the lines of things like he lost sleep because of this  
8 for six months. Well, he also had a brand new child at that  
9 time, and so if he's going through a rough time and talking to  
10 his therapist and telling his therapist, look, I'm not sleeping  
11 at night because my child is crying all night, that's going to  
12 show that, hey, him losing sleep and him saying that it's about  
13 this incident, he's told his therapist that it's actually due  
14 to the fact that he's got a young child at home, etc. He's  
15 alleged all these things in his deposition that, you know, he  
16 believes he suffered this anxiety, stress, etc., we're entitled  
17 to see whether or not he has alternative causes for those  
18 stressors and anxieties. And so, you know, the pendency, the  
19 duration of when we're talking about temporally, I think that  
20 does come into place. And while Mr. Frigerio did request the  
21 records, you know, if he didn't do it, I was going to do it,  
22 and so I would agree with Mr. Frigerio that this goes to the  
23 heart of their damages.

24 There's no use of force here. There's no personal  
25 injury. At that point, it comes down to a constitutional

1 violation on its own. What is that worth? And what is his  
2 emotional anguish worth? So this is our only chance to get  
3 some sort of secondary look at what happened to him emotionally  
4 other than what he's telling his self, which is obviously  
5 biased.

6 MS. HEBERT: Your Honor, may I respond to that?

7 THE COURT: Go ahead.

8 MS. HEBERT: Kind of two points and I want to address  
9 the Braymiller case first. That's a case where it's a  
10 diversity case and it's Texas law that's being applied, and  
11 what the Court is actually citing is Texas Rule of Evidence 509  
12 which is completely different than the federal privilege rule.  
13 The Texas 509 Rule is a physician/patient privilege and that  
14 gets automatically waived under the Texas Rule of Evidence if  
15 any party puts at issue a mental condition, so completely  
16 different standard. And then from the facts, they're very  
17 different here. In that case, the plaintiff was alleging  
18 breathing problems and sleeping problems that were like much  
19 broader than what's going on here.

20 And to the extent that Mr. Leake is drawing to the  
21 deposition testimony, that illustrates exactly Mr. Leake's  
22 point. You can cross-examine plaintiff on those issues, *Didn't*  
23 *you have a six-month child at home, didn't you have other*  
24 *things going on?* And Mr. Leake in the deposition, we limited,  
25 we objected to the extent that there were discussions of what

1 Mr. Schott told his therapist, but it's well within Mr. Leake  
2 and Mr. Frigerio's right to examine Mr. Schott on what other  
3 factual circumstances are going on in Mr. Schott's life, but  
4 what is protected is the communications between a therapist and  
5 the patient. And the Supreme Court likens that communication  
6 privilege to a spousal communication privilege, to an  
7 attorney/client communication privilege, the idea that you can  
8 communicate freely because of policy reasons, quite frankly,  
9 rather than the facts which are discoverable, as Mr. Leake has  
10 already referenced.

11 THE COURT: Okay. So, you know, I think there's a bit  
12 of a sliding scale in these situations. Certainly information  
13 pertaining to the plaintiff's anxiety and treatment for it,  
14 it's relevant, but we're really looking at a sort of one  
15 information and also proportionality. And so once I start to  
16 think about that, then I look at the context of this request.  
17 It's a request sort of broadly sent for five years of, you  
18 know, extremely confidential or personal information, along  
19 with five years of work records, again for an event that takes  
20 place in 2022. And it's sort of -- I guess the message I  
21 receive is, okay, well, then the Court can kind of figure it  
22 out, the Court can narrow something or the Court can fashion  
23 something, but I decline to do that. I'm not a lawyer in this  
24 case, I don't represent either of the parties and I don't think  
25 it's my job to jump in and roll up my sleeves and conduct your

1 discovery for you all. This is something that you all should  
2 be able to do and I should be addressing here today a vastly  
3 narrower and tailored request that's been properly served and  
4 that has some sort of assurances for me from both sides that  
5 efforts have been made to try to sort of accommodate each  
6 side's concerns. But instead, you all are miles apart and the  
7 party that I think is -- the parties that I think are further  
8 from the sort of reasonable position that I want you to be in  
9 are the requesters here, are the defendants. You know, yes,  
10 you probably can get some of this information, but when you ask  
11 for five years of it, it looks like a fishing expedition and  
12 it's just not a good look.

13           So based on the request that I have and the record in  
14 front of me, I'm going to go ahead and grant the motion.  
15 Whether there's an opportunity to seek this information in a  
16 different way or to seek some subset of information or to  
17 approach this more thoughtfully, I'll leave that up to you  
18 within the confines of your scheduling order, but you know,  
19 obviously plaintiffs have raised some pretty powerful and  
20 strong arguments about the sanctity of this type of information  
21 in a case like this where the mental anguish at issue is  
22 relatively minor, I think everybody would agree in the scope of  
23 things. Maybe there can be some sort of stipulations or  
24 understandings about what that means in terms of how it would  
25 translate into requests for damages in a case, you know, maybe



1 we're not talking about 20 million-dollar request for damages  
2 or even a one million-dollar request, I don't know. But you  
3 know, I think those kinds of discussions would sort of inform  
4 this request. Maybe there's other ways to preserve Mr.  
5 Schott's privacy and around some of these other things that  
6 might have been discussed that maybe wouldn't be relevant to  
7 the issue at hand. I know that you all defendants are looking  
8 to see if there's other issues that could be the cause of the  
9 alleged mental anguish, but again, this is, like counsel said,  
10 garden variety, low-dollar mental anguish, and so I just don't  
11 think there's enough here to justify sort of pushing forward.  
12 And I'm not going to pull out my scalpel at this stage to  
13 perform surgery on these requests, so I'm going to go ahead and  
14 grant the motion to quash the subpoenas. Is there anything  
15 further, Mr. Frigerio?

16 MR. FRIGERIO: No, Your Honor, but I take it you're  
17 not precluding us from filing another Subpoena Duces Tecum that  
18 is more tailored.

19 THE COURT: I'm not, but -- you know, I'm not  
20 impressed by these discovery requests. So if you do it and you  
21 seek it, you better do it carefully and you better do it right,  
22 and I would confer with opposing counsel significantly before  
23 doing that. Reach an agreement because assessing these  
24 arguments again on a subsequent request after you've already  
25 been to the well once, if it doesn't look like it's a slam dunk

1 to me, then I'll shift fees if I assess that motion. Anything  
2 further from you, Mr. Leake?

3 MR. LEAKE: No, Your Honor.

4 THE COURT: Okay. Ms. Hebert, anything from you or  
5 your team?

6 MS. HEBERT: No, Your Honor. Thank you.

7 THE COURT: Okay. Thanks, everyone. I'll just issue  
8 a brief written order that really just references the reasons  
9 stated here on the record for the two rulings on the motions.  
10 Thank you. Court will be in recess.

11 (10:36 a.m.)

12 \* \* \*

\* \* \* \* \*

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: December 20, 2024

/s/ Angela M. Hailey

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